82-1500

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1982
No. 82-1410

Bernard P. Colokathis,
Petitioner

v

Wentworth Douglas Hospital,
John L. Beckwith,
William Cuseck, Jr.,
Roger C. Temple,
H. Jack Myers,
John Neff

PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES SUPREME COURT

Bernard P. Colokathis,
appearing Pro Se,
of 130 Mt. Vernon Street
Dover, New Hampshire
03820

QUESTION PRESENTED

Whether or not the United States Court of Appeals for the First Circuit was correct in affirming the decision of the United States District Court for the District of New Hampshire by ruling that it was not an abuse of discretion to dismiss the Plaintiff's case, sua sponte, immediately previous to a scheduled final pre-trial conference, without a hearing or consideration of lesser sanctions, for lack of prosecution, because one of the Plaintiff's attorneys had withdrawn and the Court anticipated further delay.

TABLE OF CONTENTS

TABLE OF CASES

12. Lyford v. Carter, 274 F. 2d 680 (5th Cir. 1980).

13. Marks v. San Francisco Real Estate, 627 F. 2d 947, (9th Cir. 1980).

14. Martin-Trigona v. Morris, 637 F. 2d 468 (1st Cir. 1980).

15. Medeiros v. United States, 621 F. 2d 468 (1st Cir. 1980).

16. Pond v. Braniff Airways, Inc., 453 F. 2d 347 (5th Cir. 1972).

17. Reizakis v. Loy, 490 F 2d 1132 (4th Cir. 1973)

18. Richman v. General Motors Corporation, 437 F 2d 196 (1st Cir. 1971)

19. Saylor v. Bastedo, 623 F 2d 230 (2nd Cir. 1980)

20. SEC v. Everest management Corp., 466 F. Supp 167 (S.D. N.Y. 1979)

21. Schenck v. Bear, Stearns & Co., 583 F 2d 58 (a2nd Cir. 1978)

22. Tinnerman Products, Inc. v. Geo. Garret Co., 22 F. R. D. 56 (D.C. Pa. 1958)

23. Zavala santiago v. Gonzales Rivera, 553 F 2d 710 (1st Cir. 1977)

ADDITIONAL AUTHORITIES

1. "Involuntary Dismissal for Disobedience or Delay: The Plaintiffs Plight", 34 Univ. of Chicago L. Rev. 922 (1966)

2. Waterman, "An Appellate Judge's Approach in Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders", 29 F.R.D. 420 (1961)

3. 9 Wright and Miller, Federal Practice and Procedure § 2369, 2370

4. 5 Moore's Federal Practice § 41

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES SUPREME COURT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

BERNARD P. COLOKATHIS, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on November 15, 1982.

OPINIONS BELOW

The November 15, 1982 opinion of the

Court of Appeals, whose judgment is herein sought to be reviewed, which will be reported, and is reprinted in the appendix to this Petition at pages 8-20 in the Appendix. On December 10, 1982, the Court refused a petition for rehearing and denied a Motion to Extend (Refer to pages 66-67 of the Appendix). The prior opinion of the United States District Court for the District of New Hampshire, also reprinted in the Appendix, are reported as follows on pages 1-7, and page 21.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1982. The Motion for Extension of Time was denied, and the petition for rehearing was refused on

December 10, 1982.The jurisdiction of this court is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

STATUTE INVOLVED

There is no statutory provision involved.

STATEMENT OF THE CASE

This case was entered in the District Court on November 3, 1977. The complaint was brought against the Wentworth Douglass Hospital of Dover, New Hampshire as well as several doctors and administrators pursuant to 42 U.S.C. 1983. The Complaint alleges, inter alia, that certain doctors and hospital administrators had conspired to deprive the Plaintiff of surgical

privileges and thus unjustly deprive the Plaintiff of his livelihood. A sufficient nexus to State action was found because of the hospital's receipt of government funds and ultimate control of the hospital trustees appointed by the city council. (App., p. 33-47).

By the time of dismissal with prejudice for lack of prosecution on April 6, 1982, this case was the second oldest on the docket. It is asserted, however, that the Court acted prematurely and unreasonably in dismissing this case. The Court, in its order of November 15, 1982, quoted part of the November 13, 1981 ruling of the District Court, "This Court finds itself confronted with yet another procedural brouhaha in this overly protracted litigation..." (App., p. 2-3).

On October 9, 1981, Court had ruled

in part:

> It is the order of this court that the case shall be tried December 7, 1981. If the Plaintiff discharges present counsel, the case will go on regardless of thsis fact.
>
> The Plaintiff will appear pro se or otherwise the case will be dismissed with prejudice.(App., p. 31).

On December 7, 1982, the case did not go forward because the presiding Justice was ill, and the case was continued until April of 1982. Two days before the pretrial conference was scheduled, one of the attorneys engaged by the Plaintiff withdrew and the Court, on its own motion, dismissed the case with prejudice.

EVIDENCE

This has been a difficult case, the litigation has been protracted for various reasons: the number of Defendants, the

illness of the Presiding Justice, the difficulties of discovery, and the sudden withdrawal of Plaintiff's counsel at the most inopportune times. It is these last two problems that the defendants and the Court have relied on heavily, but these events were not within the control of the Plaintiff.

As to the first, it is obvious to note from the docket entries that the case was more than vigorously defended by all six defendants. As a matter of record, the Defendants entered at least twenty-five separate objections to the Plaintiff's requests for discovery (App., pp. 48-50). Furthermore, the defendants are not blameless in their actions, as they filed nine different requests for extension of time (App., pp. 53-54). It is clear from the evidence that defendants were not har-

rassed, but engaged in behavior calculated to prevent all proper attempts by the Plaintiff gain information necessary for the preparation of trial. This was a "paper war" instigated by the Defendants. For example, in 1979, the Plaintiff moved for a default judgment against one of the Defendants for failure to appear at a properly noticed deposition. While the Court denied the Plaintiff's motion, it noted that "counsel are being obdurate and making a travesty of the discovery process" (App., p. 23), as well as the fact that it appeared "that the deposition of the Plaintiff had been taken at least six times" (App., p. 23).

From these facts, it does not appear that the evidence supports the Defendants' and the Court's contention that the Plaintiff has engaged in the "dilatory

tactics" complained of in the District Court's opinion of April 6, 1982. (App., p. 2).

The Plaintiff has had a total of ten attorneys, some of whom served concurrently, and some who served as local counsel to meet the requirements of the District of New Hampshire Local Rule 5(b).[1] This is certainly not unusual in a case of this magnitude. In essence, he has hired two major law firms as trial attorneys: a Virginia firm and a New York firm. Two of the attorneys who appeared (Philip J. Hirschkopf and Victor M. Glasberg) were members of the same firm in Alexandria, Virginia. Leo N. Hirsch, Kurt J. Woolf and Charles Philamore Bailey, were members of Otterbourg, Steindler, Houston and Rosen, P. C. of New York. Hirsch subsequently left the firm and continued his appearance.

None of the attorneys heretofore mentioned were fired by the Plaintiff, and in fact, their withdrawals were a surprise to the Plaintiff. Additionally, the Plaintiff had various local counsel. Plaintiff's first local counsel, the firm of Flynn, McGuirk and Blanchard of Portsmouth, New Hampshire, were replaced by Arpair G. Saunders, Jr., in September of 1980 (App., p. 30) at the trial counsel's suggestion. On October 29, 1980, Alfred Catalfo of Dover, New Hampshire, entered an appearance after the sudden withdrawal of Saunders and the Virginia law firm on September 25, 1980, and withdrew almost immediately on November 17, 1980) (App., p. 30).

In December of 1981, the Virginia trial firm was replaced by Otterburg, Steindler, Houston and Rosen, PC., of New York (App., p. 30), and Mr. De Puy entered an

appearance as local counsel (App., p. 30).

Subsequently there was a change in the law firm of Otterburg, in New York, the firm withdrew (App., p. 30), and individual attorneys Hirsch and Bailey entered appearances (app., p. 30). Local counsel withdrew when the firm withdrew (App., p. 30). Any delays caused the Court by change of counsel to this point were either permitted by the Court or not objected to by the defense. However, it was also clear that these changes had provoked the Court, as it commented in an order of the District Court dated December 31, 1981 quoted by the District Court on November 15, 1981:

> ...this case has been on the docket for an interminable period of time, the Plaintiff keeps hiring and firing attorneys whenever the case is set for trial (App., p. 2).

Finally, Mr. Charles Meade of

Manchester entered as local counsel on October 29, 1981 (See Docket Entry #283). The case was scheduled for trial in December of 1981 (App., p. 26). Trial was put off by the Court's own motion due to the illness of the Presiding Justice.

Plaintiff continued his preparations for trial, and, in March was advised of the final pretrial and trial schedule through counsel. The case was scheduled for number one jury trial the week of April 27, 1982, with a final pretrial conference set for April 8, 1982.

Unexpectedly, on April 2, 1982, attorney Leo Hirsch of New York called the Court to inform it of his withdrawal. His "Motion for Leave to Withdraw", dated April 2, 1982, was received by the Court on April 5, 1982 (refer to Docket entry #315). On April 2, 1982, the Court mailed notice to the

Plaintiff advising him that Hirsch intended to withdraw and that he, the Plaintiff, should attend the April 8 1982 pretrial conference. (The letter from the Court, dated March 2, 1982, appears to be in error, as no communication of the withdrawal had been made until April 2, 1982.)

Plaintiff instructed his local counsel to continue preparation for trial, to expect him at the pretrial conference, and to instruct the Court accordingly. On April 6, 1982, the Court, sua sponte, dismissed the case with prejudice for lack of prosecution because of Attorney Hirsch's withdrawal. (App., pp. 1-7).

Plaintiff's other counsel, Mr. Meade, received notice of the dismissal on April 6 1982 by telephone, but did not receive a copy of the court order until April 9, 1982, a delay presumably caused by a major

snowstorm which caused the Court to be closed from the afternoon of April 6, 1982 and all of April 7, 1982. Mr. Meade contacted Judge Loughlin at his home on April 7, 1982 to confirm that the case had been dismissed. That day Mr. Meade informed the Plaintiff of the dismissal by telephone and informed the Plaintiff that he would have to move to vacate the order of the Court and to reinstate for trial. On April 8, 1982, the Plaintiff was able to travel to New Hampshire from Connecticut, where he had been employed, and complete an affidavit that he intended to proceed to trial on April 27, 1982 and that no further delay was sought. This affidavit (App., pp. 51-52) was attached to a Rule 60(b) motion to vacate the dismissal and reinstate for trial, which was forwarded to the Court on April 9, 1982 and entered on April 12, 1982. On April 14,

1982, this motion was denied and thus the dismissal stands (App., p. 21).

THE RULINGS BELOW

The District Court ruled to dismiss the case with prejudice, citing the Plaintiff's practice of "hiring and firing" attorneys and the "dilatory tactics" of the Plaintiff in this case (App., pp. 1-7). It obviously anticipated further delay should the Plaintiff hire new counsel and the Court give the counsel leave to for an extension of time to review the case. Furthermore, the Court, citing its heavy caseload, found that dismissal with prejudice was the proper remedy. It noted the "voluminous discovery and depositions" but was of the opinion that "mnemonics would be needed to try this case." (App., p. 7).

The Court relied on Link v. Wabash

R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) to support its case with Medeiros v. United States, 621 F. 2d 468. (App., pp. 1-7).

Further, the trial Court denied the motion by one of Plaintiff's remaining counsel for reinstatement. (App., p. 21).

The Court of Appeals highlighted the facts that there had been extensive discovery completed by the Plaintiff's first counsel that after new trial counsel entered the case in 1980, there was concern expressed by the trial Court over the lack of discovery. The Court also appeared to be impressed by the fact that both main trial attorneys who withdrew, (Glasberg et. al. and Hirsch) alleged "irreconcilable differences" with the Plaintiff. The Court found that, in view of the "dilatory tactics of the plaintiff, the cost to the defen-

dants, the waste of judicial resources and the probability of further delay" (App., 1-7) all given as reasons for the dismissal, the lower Court was within its discretion.

As to the issue of whether or not the trial Court should have invoked less drastic sanctions, the Court of Appeals merely reiterated the reasons of the lower court, citing Medeiros v. United States, 621 F. 2d 468, 470 (1st Cir. 1980) (quoting Zavala Santiago v. Gonzalez Rivera, 553 F. 2d 710, 712 [1st Cir. 1977]) (App., p. 16) where it was ruled that such a sanction was necessary to "prevent the further delay and harassment of the court and the defendants" (App., p.16).

It also found the Plaintiff's delays were "due largely to his inability to get along with his counsel with the result that after four and one half years the case

was still not prepared for trial" (App., p. 19).

For the abovementioned reasons, the Court, on appeal, found that there was no unfairness in not permitting the Plaintiff one more opportunity to presuade the court that there would be no further delays.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to allow the Court to review the questions of the balancing of the rights of a Plaintiff against the needs for judicial economy.

In the instant case, the Court abused its discretion in dismissing the case of a Plaintiff therefore disallowing the Plaintiff a hearing on the merits. While the Court has an inherent power to dismiss a case for lack of prosecution (Link v. Wabash R.R. CO., 370 U.S. 626, 82 S. Ct. 1386, 8 L.

Ed. 2d 734 (1962), reh. den. 371 U. S. 873, 9 L. Ed. 2d 112, 83 S. Ct. 115), the evidence is clear that this power was misapplied in the instant case. In Medeiros v. United States, 621 F. 2d 468 (1st Cir. 1980), it was said that the sanction of dismissal with prejudice is indicated in those cases where lack of prosecution occurs in order to prevent "undue delays..., docket congestion, and, the possibility of harrassment of a defendant."

The evidence shows that any undue delays were not within the control of the Plaintiff, that he was vigorously prosecuting, and that the defendants were not in fact being harrassed. It is clear that the Court dismissed the case because of its congested docket. (The Court, in its April 6, 1982 decision, complained that he had 474 cases assigned to him [App., p. 5]). This

sets a very dangerous precedent in the face of the rulings that a trial court's order of dismissal should be tempered by a careful exercise of judicial discretion. Richman v. General Motors Corp., 437 F. 2d 196, (1st Cir. 1971), citing Durgin v. Graham, 372 F. 2d 130, 131 (5th Cir. 1967).

While there are no precise guidelines for an appellate court to determine whether or not the trial court has been within its discretion, the events and conditions existing in each case should be explored. Richman, supra, 437 F. 2d at 199. There is strong policy favoring the consideration of a case on its own merits, which is to be balanced against the effects any misconduct of the plaintiff. Richman, supra, at 199; citing Dyotherm Corp. v. Turbo Machine Co., 392 F. 2d 146, 149 (3rd Cir. 1968); Flaska v. Little River Marine

Construction Co., 389 F. 2d 885, 888 (5th Cir. 1968), cert. den., 392 U.S. 928, 88 S. Ct. 2287, 20 L. Ed. 1387 (1968); Davis v. Operation Amigo, Inc. 378 F. 2d 101, 103 (10th cir. 1967).

Undoubtedly, the fact that the Court may have a burdensome caseload should not be the prime consideration. Lyford v. Carter, 274 F. 2d 815 (2nd Cir. 1960). In fact, the rights of the Plaintiff to redress of grievances should not depend on whether or not the Court is congested, although they will undoubtedly be affected by it.

The sanction of dismissal with prejudice is not usually applied except in the most frivolous of actions, and the Court will inquire carefully into whether or not the delay or misconduct of the Plaintiff should warrant dismissal. See, for instance, Reizakis v. Loy, 490 F. 2d 1132,

1135 (4th cir. 1973), citing Durham v. Florida East Coast Ry. Co., 385 F. 2d 366, 368 (5th Cir. 1967). See generally, 9 Wright & Miller, Federal Practice and Procedure Sec. 2369, 2370.

Dismissal has been warranted where there has been a clear showing of disobediance by Plaintiff or his counsel. Medeiros, supra, 621 F. 2d at 470-471; Associacion de Empleados del Institute de Cultura Puerto-Requena et. al. v. Rodriguez Morales, 538 F. 2d 915 (1st Cir. 1976); Martin-Trigona v. Morris, 637 F. 2d 680 (5th Cir. 1980); Anthony v. Marion County General Hospital, 617 F. 2d 1164 (5th Cir. 1981).

However, dismissal with prejudice has not been adjudged the proper remedy where, as in this case, the Defendants contributed to the delay. Dyotherm Corp. v. Turbo Machine Co., 392 F. 2d 146 (3rd Cir.

1968); Foxboro Co. v. Fisher & Porter Co., 29 F.R.D. 522 (E.D. Pa. 1961); Tinnerman Prods. Inc. v. Geo. Garret Co., 22 F.R.D. 56 (D.C. Pa. 1958).

It is obvious that the trial Court was very concerned that this case had been four and one half years on the docket. The Plaintiff recognizes that the necessity of an orderly and active docket is a consideration in dismissal for lack of prosecution. However, there are no rigid time limits governing the length of time any given case may remain on the docket. SEC v. Everest Management Corp., 466 F. Supp. 167 (S.D.N.Y. 1979); Marks v. San Francisco Real Estate, 627 F. 2d 947 (9th Cir. 1980).

In this case, the act which triggered the Court's ire was the withdrawal of the Plaintiff's counsel two days before the final pretrial, an act which the

Plaintiff had no control over. Clearly, the only possible impediment to judicial economy in the instant case was the Court's fear that further delay would be sought by the Plaintiff (App., p.7). Unfortunately, the Court mistakenly assumed that the withdrawal of Plaintiff's counsel would result automatically in further delay (App., p. 7). While it is clear that under the circumstances the Plaintiff's local counsel might have preferred additional time to prepare, the Plaintiff himself was willing to appear pro se, if necessary, in light of the Court's previous order of October, 1981, (App., p. 27), and had indicated that he was prepared to proceed to trial in his affidavit submitted with his motion for reinstatement (App., pp. 51-52). As a matter of fact, it was not necessary for the Plaintiff to appear pro se, as he would

have been able to go forward with his local counsel and remaining New York counsel. See, Schenck v. Bear Stearns & Co., 583 F. 2d 58, 25 F.R. Serv. 1505 (2nd Cir. 1978); Reizakis, supra, 490 F. 2d at 1134. Additionally, there is no Court rule that limits the function of local counsel to appear as "trial counsel".

The erroneous conclusion of the Court that the withdrawal would result in further delay was both premature and unfortunate. The Court had only to wait forty-eight hours for the final pre-trial conference in order to determine whether the Plaintiff had either abandoned the case or failed to prepare for trial.

While the Plaintiff is aware that the sharply divided opinion of Link v. Wabash Railroad Co., supra, 370 U.S. at 633-634 gives some credence to the view that he

is bound by the action of his counsel when his conduct results in dismissal, there are cases that have not followed that rule. Reizakis, supra, 490 F. 2d at 1135, citing Edsall v. Penn Central Transportation Co., 479 F. 2d 33, 35 (6th Cir. 1973). See generally, 5 Moore Fed. Proc. Par. 41.11 (2); Fed. Proc., L. Ed. Sec. 62:504; "Involuntary Dismissal for Disobediance or Delay: the Plaintiff's Plight", 34 University of Chicago Law Review 929 (1966). Even if it can be argued that the Plaintiff should be held responsible for the actions of his counsel, this rule should apply in situations where the attorney is in the course of preparation and trial of a case. It is inconceivable that counsel's act of abandonment of the Plaintiff should result in Court sanctions. While the Court concluded that the attorney's action was the

Plaintiff's fault (App., p. 19), the Plaintiff disagrees.

Perhaps the inherent power of a District Court to dismiss a case does not require notice and hearing (Link v. Wabash R.R. Co., supra, 370 U.S. 626, but the Court qualified this by its statement that "the adequacy of notice and a hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the circumstances of his own conduct." Link, supra, 370 U.S. at 632. See also Saylor v. Bastedo, 623 F. 2d 230, 238 (2nd Cir. 1980).

Certainly, in the present case, the withdrawal of Hirsch was unanticipated by both Plaintiff and his remaining counsel. A hearing on the dismissal is warranted under the instant circumstances. In Link,

where Justice Black found it unfair to charge a Plaintiff with notice that failure to attend a pre-trial conference would result in dismissal (Link, supra, 370 U.S., n. 10, at 642) this Plaintiff is being charged with notice that withdrawal of an attorney would result in dismissal, and he was never afforded the opportunity to attend the pre-trial conference. Fundamental fairness dictates the necessity of a hearing for the Plaintiff to attempt to explain the reasons for the conduct which has provoked the Court's dismissal. See generally, Fed. Proc. L. Ed., Sec. 62:504; 5 Moore's Fed. Prac. Sec. 41.11 (2), p. 41-158. This is especially important when it may well result that there will be no dismissal where the situation is satisfactorily explained. Kuzma v. Bessemer & Lake Erie R.R., 259 F. 2d 456 (3rd Cir. 1958).

Finally, even if it is to be shown that the Plaintiff was charged with the actions of his counsel under these circumstances, it was an abuse of discretion of the trial Court not to consider less drastic sanctions. Dismissal with prejudice is an extreme measure, and must be carefully considered (Associacion de Empleados v. Rodriguez Morales, 538 F. 2d 915, [1st Cir. 1976]; Richman, supra, 437 F. 2d at 199; see also, Durgin v. Graham, 372 F. 2d 130, 131 (5th Cir. 1972), and failure to do so should result in reversal (Reizakis, supra, 490 F. 2d, at 1135, citing Richman, supra, 437 F. 2d at 199; Flaska, supra, 389 F. 2d at 887; Dyotherm, supra, 392 F. 2d, at 148).

Lesser sanctions to be considered include a warning, a formal reprimand, placing the case at the bottom of the list, a fine, the imposition of costs or attorneys

fees, the temporary suspension of counsel from practice before the Court, and dismissal of the suit unless new counsel is secured. Zavala Santiago v. Gonzales Rivera 553 F. 2d 710, n. 1 at 712 (1st Cir. 1977); Richman, supra, 437 F. 2d, 4 at 199; Reizakis, supra, 490 F. 2d at 1134-1135; Pond v. Braniff Airways Inc., 453 F. 2d 347 (5th Cir. 1972); 5 Moore's Fed. Proc. Par. 41.11 (2), at 41-145. Additionally, the Court could have suggested a "conditional dismissal" (see "Involuntary Dismissal for Disobediance or Delay: the Plaintiff's Plight", 34 Univ. of Chicago Law Rev. 922, 929 [1966]; Waterman, "An Appellate Judge's Approach in Reviewing District Court Sanctions Imposed for the Purposes of Insuring Compliance with Pretrial Orders", 29 F.R.D. 420 [1961]) or have allowed the case go to trial as scheduled.

In conclusion, the Court's abuse of discretion has resulted in the abrogation of the substantive right of the Plaintiff to seek redress in the Courts. It is important that, in like cases, the Plaintiff be afforded notice and hearing should the Court hold him completely responsible for all actions of his counsel. Definite guidelines should be set to determine the proper sanctions to be imposed by the trial Courts to avoid capricious dismissals of important cases sua sponte.

CONCLUSION

WHEREFORE the Petitioner respectfully prays that a writ of certiorari be granted.

Bernard P. Colokathis,

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Bernard F. Colokathis

v. #C77-352-L

Wentworth-Douglas Hospital, et al.

ORDER DISMISSING CASE ON COURT'S OWN MOTION

Appended to the order is a copy of the docket markings from the date of the filing of the complaint November 3, 1977 to February 4, 1982. This case has been on the docket as of today's date 1,615 days. The case has been specially assigned as the number one jury case to commence April 27, 1982. In fact this court importuned the Superior Court of New Hampshire the week of March 29, 1982 to continue a very important state case because one of the attorneys involved in this case, Edward Kaplan had a conflict concerning trial dates.

To add further impetus to what might

at first blush appears to be a Draconian order of a rhadamanthine judge is a quote from a recent order of the court dated December 31, 1981.

ORDER ON MOTION TO WITHDRAW ORDERS

> Motion denied. The court has stated on the record its reasons for denying said motion. They are that this case has been on the docket for an interminable period of time, the plaintiff keeps hiring and firing attorneys whenever the case is set for trial and it would be inequitable to subject the defendants to further depositions because present counsel may feel that past counsel were incorrect or failed to depose said witness completely.
>
> December 30, 1981.

Quoting partially from a court order of November 13, 1981 which is directly germane to the dilatory tactics of the plaintiff.

> This court finds itself confronted with yet another procedural brouhaha in this overly protracted

> litigation, and thus yet another step away from trial. At issue now, succinctly stated, are plaintiff's motions to withdraw orders denying his motion for further discovery and to proceed without local counsel.

Plaintiff has been represented by seven separate counsel, both concurrently and consecutively, since this action was first initiated. Plaintiff's present counsel, Leon Hirsch, filed a formal appearance on July 24, 1981. He had been involved with the case prior to that time, however, having attended a pretrial conference held January 21, 1981. Mr. Hirsch was disappointed with the discovery obtained by his predecessors and desired further discovery. We quote from the court's order of September 11, 1981

> Mr. Hirsch officially entered this case on January 15, 1981 when he participated in a further pretrial which was held on that date. He advised the court that he would

complete his review of the Glasberg file and advise the court and parties what further discovery would be necessary by March 16, 1981. The parties agreed to meet together and attempt to arrive at a discovery schedule without the need of a further pretrial. (See Order dated January 20, 1981.) This time was extended to July 31, 1981 on the basis of a Motion to Enlarge Time to Request Further Discovery file by Mr. DePuy and granted on March 24, 1981. By letter dated May 22, 1981, Mr. Hirsch pointed the discovery he desired to pursue under Rule 26. On June 11, 1981 Judge Loughlin advised counsel that no further continuances would be granted in the case. By letter date June 10, 1981, Mr. Van Loan advised in no uncertain terms that " . . .I for one do not intend to voluntarily provide him (Mr. Hirsch) with anything of the kind." referring to the May 22, 1981 letter. Defendant Neff on June 19, 1981 moved to have the Court prohibit further discovery. Plaintiff timely objected to the Neff motion on June 26, 1981. By letters dated June 26, 1981 and July 1, 1981 both Mr. Van Loan and Mr. Kaplan requested a further pretrial for the purpose of discussing discovery in light of Mr. Hirsch's letter of May 22, 1981 and trial date of December 7, 1981. At the request of both plaintiff's and defendant's counsel, because of their vacation schedules, said pretrial was continued until September 10, 1981.

An attorney's lien has been filed by Attorney Arpiar Sauders and Victor M. Glasberg. See docket number or entry 249.

The defendants in this action have incurred costly legal expenses and their attorneys frustration with the dilatory tactics of the plaintiff.

The court, which in this case includes the labor of two judges and a magistrate has been subjected to a nugatory description of judicial time and economy where its docket has increased over 70%. As of today's date, the court has 474 cases assigned to him.

Reference is made to Mederios v. United States, 621 F.2d 468 (1st Cir. 1980)

> While dismissal with prejudice is a severe sanction, at times it becomes necessary.
>
> A district court unquestionably has the authority to dismiss a

case undue delays in the disposition of pending cases, docket congestion, and the possibility of harassment of a defendant. See Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); 9 Wright & Miller, Federal Practice and Procedure Sec. 2370 at 199. Because of strong policy favoring the disposition of cases on the merits, see Richman v. General Motors Corp., 437F.2d 196, 199 (1st Cir. 1971), we, and federal courts generally, have frequently warned that dismissals for want of prosecution are drastic sanctions, which should be employed only when the district court, in the careful exercise of its discretion, determines that none of the lesser sanctions available to it would truly be appropriate. See Asociacion de Empleados v. Rodriguez Morales, 538 F.2d 915 (1st Cir. 1976); Richman v.General Motors Corp., supra. See also Durgin v. Graham, 372 F.2d 130, 131 (5th Cir. 1972). But we have not hesitated to affirm dismissals of suits for want of prosecution in the appropriate cases. See Pease v. Peters, 550 F.2d 698 (1st Cir. 1977); Asociacion de Empleados v. Morales, supra; cf. Luis Forteza e Hijos, Inc. v. Mills, 534 F.2d 415 (1st Cir. 1976)."

The complaint states alleged courses of action commencing as far back in

time as 1975 and 1976. Regardless of the voluminous discovery and depositions after seven years mnemonics would be needed by all to try this case. To allow the plaintiff to take advantage of New Hampshire Rule 6 is once again to put this case at least two years down the road while new counsel becomes familiar with the voluminous file.

Enough is enough. The case is dismissed with prejudice.

April 6, 1982 /s/ Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

Michael O'Shaughnessy, Esq.
Edward M. Kaplan, Esq.
Leo N. Hirsch, Esq.
Eugene M. Vanloan, Esq.
Charles A. Meade, Esq.
Bernard F. Colokathis,
Charles Philamore Bailey, Esq.
Joseph P. Nadeau, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 82-1410

BERNARD P. COLOKATHIS,

Plaintiff, Appellant,

v.

WENTWORTH DOUGLASS HOSPITAL, ET. AL.,

Defendants, Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

(Honorable Martin C. Loughlin,
U.S. District Judge.)

Before
Coffin, Chief Judge

Timbers, of the Second Circuit,
sitting by designation,
Senior Circuit Judge.

and Breyer, Circuit Judge.

Charles A Meade, with whom Stephen Fine and Associates, P.A. was on brief, for appellant.

Charles M. Larsen, with whom Eugene Van Loan, III, A.J. McDonough, and Sulloway, Hollis and Soden were on brief, for appellee.

November 15, 1982

COFFIN, Chief Judge. Bernard Colokathis appeals from an order of the District Court of New Hampshire dismissing his complaint for want of prosecution. After hearing oral argument from the parties and carefully reviewing the record, we conclude that the district court was within the proper exercise of its discretion in dismissing the case.

The case has a long history. We rehearse here only the highlights. Plaintiff filed his complaint in November of 1977. Extensive discovery was conducted by plaintiff's first trial counsel and a trial date was set for June 9, 1980. On May 6, 1980, the case was continued on the court's own motion and the trial date was changed to December 29, 1980. On September 24, 1980, plaintiff's counsel withdrew, citing serious and irreconcilable dif-

ferences with the plaintiff. There followed a parade of new counsel for the plaintiff, totalling at least seven by May of 1982.[1] One of the new counsel, David DePuy, entered on December 10, 1980. Because he "had not had an opportunity to review all of the pleadings and discovery compiled to date", he asked for and was granted a continuance in the trial from the scheduled December 29, 1980 date to December 7, 1981.

On January 15, 1981, another new counsel, Leo Hirsch, appeared on behalf of the plaintiff. He advised the court that he expected to be able to review the file of approximately 4,000 to 5,000 pages within six weeks of receiving it. The court gave him until March 16, 1981 to notify the court and parties what further discovery would be necessary to prepare the plaintiff's

case for trial. On March 11, 1981, the plaintiff reported to the court that it was "impossible to complete the review of the file in a thorough manner so as to be able to decide what additional discovery might be required by March 16, 1981." The court granted an extension to July 31, 1981. On May 22, 1981, attorney Hirsch outlined his requested discovery and defendants objected. On June 11, 1981, the court announced that the case would take priority on his calendar and that "[n]o further continuance will be granted." At a hearing on September 11, 1981, the trial judge expressed his concern over "the lack of any discovery since my Order of January 20, 1981, and the close proximity of final pretrial on November 20, 1981 and trial date of December 7, 1981" and ordered a September 11, 1981 cutoff for plaintiff's additional

discovery requests and an October 8, 1981 hearing on discovery objections.

On September 16, 1981, plaintiff's local counsel withdrew. Plaintiff failed to appear at the discovery hearing, held on October 9, and the court denied the discovery requests. On October 21, 1981, attorney Hirsch moved to have the October 9 orders withdrawn, arguing that they amounted to a denial of due process.

On October 28, 1981, new local counsel appeared and moved to continue, arguing that attorney Hirsch had not received notice of the October 9 hearing and that "at the very best the discovery conducted by plaintiff's previous trial counsel was inadequate." On November 13, 1981, the trial judge denied the motion to withdraw the October 9 orders, denied all further discovery and all further

continuances, "absent the most exigent of circumstances", and ordered that "this case will proceed to trial as presently scheduled, or it will be dismissed with prejudice." Because of the trial judge's illness, the trial date was changed again, to April 27, 1982. The final pretrial conference was scheduled for April 8, 1982.

On April 2, 1982, attorney Hirsch withdrew, citing "irreconcilable differences" with the plaintiff over the payment of legal fees and the conduct of the case. On April 6, 1982, the court dismissed the case. The court noted the dilatory tactics of the plaintiff, the cost to the defendants, the waste of judicial resources and the probability of further delay. Plaintiff's local counsel moved to reinstate the case, assuring the court that he was ready, willing and able to proceed with

the case as scheduled. The court denied the motion.

On appeal, plaintiff argues that the court abused it discretion by not considering less drastic sanctions than dismissal and by not waiting until the date set for trial to determine whether the latest change in counsel would result in further delay of the case. He also asserts that he should have had notice and a hearing prior to the dismissal of his case or at least an opportunity to explain to the court the reasons for the actions that provoked dismissal. We disagree.

We have had several occasions recently to rehearse the standards for dismissal, under Fed. R. Civ. P. 41(b), for want of prosecution. As we noted in Medeiros v. United States, 621 F.2d 468, 470 (1st Cir. 1980) (quoting Zavala Santiago v.

Gonzalez Rivera, 553 F.2d 710, 712 (1st Cir. 1977)):

> "A district court unquestionably has the authority to dismiss a case undue delays in the disposition of pending cases, docket congestion, and the possibility of harassment of a defendant. See Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); 9 Wright & Miller, Federal Practice and Procedure Sec. 2370 at 199. Because of strong policy favoring the disposition of cases on the merits, see Richman v. General Motors Corp., 437F.2d 196, 199 (1st Cir. 1971), we, and federal courts generally, have frequently warned that dismissals for want of prosecution are drastic sanctions, which should be employed only when the district court, in the careful exercise of its discretion, determines that none of the lesser sanctions available to it would truly be appropriate. See Asociacion de Empleados v. Rodriguez Morales, 538 F.2d 915 (1st Cir. 1976); Richman v.General Motors Corp., supra. See also Durgin v. Graham, 372 F.2d 130, 131 (5th Cir. 1972). But we have not hesitated to affirm dismissals of suits for want of prosecution in the appropriate cases. See Pease v. Peters, 550 F.2d 698 (1st Cir. 1977); Asociacion de Empleados v. Morales, supra; cf. Luis Forteza e Hijos, Inc. v. Mills, 534 F.2d 415

(1st Cir. 1976)."

This was an appropriate case for dismissal. The court had endured four and a half years of delay and confusion, contributed to by at lease seven different attorneys for the plaintiff. It had repeatedly warned that no further delay would be countenanced. In light of the prior requests for continuances to give new counsel the opportunity to familiarize themselves with the voluminous record and the fact that local counsel, prior to the withdrawal of attorney Hirsch, apparently had little involvement in the conduct of trial preparation, the district court was warranted in concluding that the most recent changing of the guard could only signal further delay. We see no reason why the court and the defendants should have

been put to further trial preparation expense that would have been required had the court waited to dismiss the case when the plaintiff actually requested further delay.

As the plaintiff points out, we have counseled in other cases that the court should consider less drastic sanctions than dismissal. See Zavala Santiago v. Gonzalez Rivera, 553 F.2d 710, 712 (1st Cir. 1977) (suggesting sanctions such as a warning, a formal reprimand, placing the case at the bottom of the calendar list, a fine, the imposition of costs or attorney fees, and the temporary suspension of the counsel from practice). Here we see no less drastic sanction that would have served to prevent the further delay and harassment of the court and the defendants that the court's order sought to avoid.

Nor are we persuaded that the plaintiff was entitled to notice and a hearing before the court dismissed the case. The Supreme Court has made clear that "when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting." Link v. Wabash Railroad Co., 370 U.S. 626, 633 (1962). See also Corchado v. Puerto Rico Marine Management, Inc., 665 F.2d 410 (1st Cir. 1981).

In light of the fact that the plaintiff's problems are apparently due largely to his own inability to get along with his counsel, with the result that after four and a half years the case was still not prepared for trial, and of the court's repeated warning that further delay

would result in dismissal of the case, we cannot say that there was any unfairness to the plaintiff in the fact that he was not afforded one final opportunity to try to persuade the court that the history of delays would not be repeated.

The judgment of the district court is affirmed.

FOOTNOTES.

1. There is some confusion as to the exact number of attorneys. Plaintiff counts ten, five local counsel and five out of state counsel, but his count includes two attorneys who may never have formally appeared in the action. In any case, seven are enough.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT
OF NEW HAMPSHIRE

Bernard P. Colokathis

v. #C77-352-L

Wentworth Douglass Hospital
John L. Beckwith, William
Cusack, Jr., Roger C. Temple,
H. Jack Meyers, and John Neff

ORDER ON MOTION TO VACATE ORDER OF
DISMISSAL AND REINSTATE FOR TRIAL

On March 2, 1982, this court was in Florida on vacation. The Clerk of Court followed local rule 6(d). Attorney Meade was local counsel in accordance with local rule 6 (b) and never indicated he was trial counsel. Motion denied.

April 14, 1982

/s/Martin F. Loughlin
Martin F. Loughlin
U. S. District Judge

Charles A. Meade, Esq., Eugene M. Van Loan, III. Esq., Joseph P. Nadeau, Esq., Martin L. Gross, Esq., A. J. McDonough, Esq.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Bernard P. Colokathis, M.D.,

v. #C77-352-L

Wentworth-Douglass Hospital, et al.

ORDER

The Court rules as follows on the plaintiff's motion for default judgment. Motion denied.

The Court rules as follows on the plaintiff's motion for alternative relief. Granted as to immediate compliance with all discovery proceedings consistent with the Court's later orders hereinafter set forth. The remainder of plaintiff's requests in the alternative are denied including costs of the plaintiff's motion.

As the Court stated on the record, the order of William H. Barry, Magistrate, is hereby reaffirmed relative to the taking

of Dr. Colokathis' deposition.

The Court considers this to be a very important case as far as all parties are concerned. It is evident from the voluminous files and judge time so far necessitated in this case that counsel are being obdurate and making or attempting to make a travesty of the discovery process. Counsel are hereby notified that this case will be closely monitored by this Judge as it has been assigned to him. Therefore, the following orders will be strictly adhered to under the threat of sanctions.

1. All discovery shall be completed on or before October 1, 1979.

2. By discovery, the Court means depositions shall be completed by October 1, 1979. It is the Court's understanding that the deposition of the plaintiff has been taken at least six times and that Drs. Neff,

Cusack, Young, Kennedy, Randall, Temple, and Myers have been taken on one or more occasions. Mr. John L. Beckwith's deposition has been taken. A deposition was taken in Ohio, there were three days of depositions in June--June 19 through the 21st and again on May 17 and 18th, 1979.

3. This case shall be ready for pre-trial sometime in October, 1979 unless for good cause shown, shall be tried in January or February of 1980. In the future, counsel for the plaintiff shall have local counsel with him on any court hearing or to co-sign any further memos that may be filed in this Court.

SO ORDERED,

June 22, 1979

/s/ Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

CC Victor M. Glasberg, Esq.
Eugene Van Loan III, Esq.

Edward M. Kaplan, Esq.
John P. Shea, Esq.
A.J. McDonough, Esq.
Apiar G. Saunders, Esq.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Bernard P. Colokathis,

v. #C77-352-L

Wentworth-Douglas Hospital, et al.

ORDER ON MOTION TO CONTINUE PRETRIAL AND TRIAL

Motion granted. Case will be assigned at the call of the list on Friday, December 19, 1980 at 10 A.M.

December 11, 1980

/s/ Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

R. David DePuy, Esq.
Edward Kaplan, Esq.
A.J. McDonough, Esq.
Eugene Van Loan, Esq.

THE UNITED STATES DISTRICT COURT FOR DISTRICT OF NEW HAMPSHIRE

Bernard P. Colokathis, M.D.

v. #C77-352-L

Wentworth Douglass Hospital, et. al.

ORDER ON MOTION FOR PLAINTIFF TO HAVE LOCAL COUNSEL

Motion granted. Plaintiff must have local counsel file an appearance on or before November 2, 1981 or the case will either be dismissed or the plaintiff shall try the case pro se. If the plaintiff does not have local counsel, he shall notify the court that he is appearing pro se on or before November 2, 1981.

October 9, 1981.

/s/Martin F. Loughlin
U.S. District Judge

Honorable Joseph P. Nadeau, Dr. Bernard P. Colokathis, Kenneth G. Bouchard, Esq., Leo N. Hirsch, Esq., Eugene Van Loan, Esq., Edward M. Kaplan, Esq.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Bernard P. Colokathis, M.D.

v. #C77-352-L

Wentworth Douglass Hospital, et al.

ORDER RELATIVE TO NOTICE OF DEPOSITION, OBJECTIONS THERETO

Latest counsel for Plaintiff Bernard P. Colokathis, M.D., Leo N. Hirsch, filed on October 5, 1981 a notice of deposition to be taken on October 22, 1981. Counsel for defendants, Neff, Cusak, Jr., Temple, Molori and Wentworth Douglass all objected to the Notice of Deposition,

Defendants counsel were all present at a hearing on these motions on October 9, 1981 at 9:00 A.M. Plaintiff's counsel failed to appear.

The gist of defendants objections were that it would be inequitable to

redepose their respective clients because extensive depositions have been taken by plantiff's prior attorneys. The assertions of defendant's counsel are correct and the court agrees with their contentions.

This case as of today's date has been on the docket for 1,435 days and is the fourth longest case in time that has not been reached for trial.

The court is is listing from the 269 docket entries, the history of counsel representing the plaintiff which includes their appearances and subsequent withdrawals.

C77-352-L filed 11/3/77

269 Docket Entries

11/3/77 Complaint filed, Raymond P. Blanchard, Esq. (local counsel) Flynn, McGuirk & Blanchard

and

Victor M. Glassberg, Philip J. Hirschkop,

Hirschkop & Grad, P.O. Box 1226, Alexandria, VA 22313

9/15/77 Blanchard withdrew, Arpiar G. Saunders substituted as local counsel 9/7/78

10/29/80 Atty Alfred Catalfo, Jr. appears

11/17/80 Atty. Alfred Catalfo, Jr. withdraws

12/10/80 Atty's lien filed---RSA 311:13, Saunders and Glasberg

10/8/80 Glassberg & Saunders withdrew

12/10/80 Appearance R. David DePuy, McLane, Graf, Raulerson & Middleton

12/22/80 Atty Charles P. Bailey of Otterbourg, Steindler, Houston and Rosen P.C., N.Y., N.Y. filed appearance

12/31/80 Appearance by Leo N. Hirsch of Hirsch & Wolfe N.Y., N.Y.
1/23/81

7/24/81 Atty Wolff of Otterbourg firm withdraws

9/21/81 Attorney DePuy of McLane, Graf, Raulerson & Middleton withdraws

This case was originally assigned to Bownes, J. prior to his elevation to the First Circuit Court of Appeals. This

court's first contact with the case was on his appointment in May of 1979. A vigorous presentation was made by Attorney Glassberg prior to his withdrawal on December 8, 1980 and the court had innumerable hearings as did Magistrate William H. Barry, Jr. It appears that whenever the case is ready for trial, new counsel appears and decides to commence the action anew. This has been a matter of concern, not only to the court, but also to opposing counsel and their clients and the resulting expense to them. Therefore, it is the order of this court that the case shall be tried commencing December 7, 1981. If the plaintiff discharges present counsel, the case will go on regardless of this fact.

The plaintiff will appear pro se or otherwise the case will be dismissed with prejudice.

October 9, 1981

/s/ Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

Bernard P. Colokathis, M.D.
Kenneth G. Bouchard, Esq.
Leo N. Hirsch, Esq.
Eugene VanLoan, Esq.
Edward M. Kaplan, Esq.
Honorable Joseph P. Nadeau

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Bernard P. Colokathis

v. #C77-352-L

Wentworth-Douglass Hospital, et al.

ORDER ON MOTION TO DISMISS

Dover v. Wentworth Douglas Hospital does hold that the City of Dover has limited control over the hospital, but the decision is based solely on a statutory construction. The court wrote:

> It follows that the question of whether the city council may compel the hospital board of trustees to include in their annual report to the council a list of the individual salaries of the hospital employees is governed not by ownership, but by the special statutes involved.

114 New Hampshire at 125-126. The court then examined the applicable statutes (1905 N.H. Laws, Chapter 162; 1913 N.H. Laws Chapter 303; 1947 N.H. Laws Chapter 402; 1949 N.H. Laws Chapter 430 VI; 1953 N.H. Laws

358 Paragraph 16, 1963 N.H. Laws Chapter 425) and concluded, as defendants argued, that the control by the City of Dover is limited to five areas: 1) appointment of trustees; 2) removal of trustees for cause; 3) ex officio membership on the board of trustees; 4) appropriation of funds; 5) receipt of the annual report. But while the legislature did not vest total control over the hospital in the City of Dover, this does not preclude a finding of state action. The legislature gave the powers not given to the city to the Board of Trustees. As applicable herein, 1905 N.H. Laws Chapter 162 provides

> Said board of hospital trustees . . . may employ and fix the compensation of such agents as they shall deem expedient, and remove any of said agents at pleasure, and make necessary rules and regulations for their own government . . .

The statute in effect at the time

this cause of action arose was 1953 Laws Chapter 358 Sec. 16, which provides in pertinent part,:

> Said board of hospital trustees may appoint a hospital director, and such employees as they shall deem expedient and fix their compensation, and may remove said officers and employees and make necessary rules and regulations for their own government and for the control and management of all property, real or personal, connected with said hospital, not inconsistent with the merit plan ordinance adopted by the city council.

Whether the state acts through a municipality or through a board of trustees, it is still the state which is acting. Gilmore v. City of Montgomery, 417 U.S. 556 (1979) teaches that the state does not escape constitutional responsibilities for its actions by acting through a superficially private entity. That case involved a transfer of recreational responsibilities from city facilities which were closed

in reponse to a desegregation order to the YMCA, which continued the segregated recreation practice the city could not. While that case involved an intent to circumvent a desegregation order and evade constitutional requirements that are not present here, this distinction does not vitiate the court's ruling that

> This proscription on state action applies de facto as well as dejure because "conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitatons placed upon state action". Evans v. Newton, 382 U.S. 296, 299 (1966).

The form of entity the state chooses as its agent to implement its policy has no bearing on the state's ultimate responsibility for the actions of its agents.

As state action is direct here, there is no need to find a nexus. But the

nexus is readily established in any event. Defendants argue that the state action inquiry has moved from a "sifting of facts and weighing of circumstances theory of Downs v. Sawtelle, 574 F.2d 1 (1st Cir 1978) to a state-private actor partnership in Rendell-Baker v. Kohn, 641 F.2d 14 (1st Cir. 1981), cert. filed, No. 80-2102, 50 L.W. 3083 (June 12, 1981). If there has been such a shift in the legal theories underlying a finding of state action, it is more form than substance. Where Downs court sifted factors to indicate state action, the Rendell Baker court sifted essentially the same factors to show an intertwined relationship. That intertwined relationship in turn shows state action. The Downs court also discussed the Rendell Baker rationale, stating:

> The essence of Burton which

> Although we do not presume to establish the "precise formula" which the Supreme Court has declined to fix, we think it possible to identify certain factors which have tended to weigh heavily in findings of such a relationship.

641 F.2 at 23. The court then identified four factors as indicative of past findings of an intertwined relationship; those factors will be examined seriatim in the context of this case.

The first factor indentified is the use of public property. The court identified this as "the strongest factor" indicating the intertwined relationship in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), Gilmore v. City of Montgomery, supra and Fortin v. Darlington Little League, 514 F.2d 344 (1st Cir. 1975). In this case the Wentworth Douglas Hospital, although constructed with private funds, has been presented to and accepted by the

> survives Jackson is that the relationship between the state and the private institution may be so intertwined that the state will be held responsible for conduct of the institution with which it had no direct connection.

574 F.2d at 9. The court quoted from Holodnak v. Avco Corp., 514 F.2d 285, 288 (2nd Cir. 1975) that the Supreme Court

> . . . recognized the continued viability of the principle enunciated in Burton v. Wilmington Parking Authority . . . and Moose Lodge . . . that where the state goes beyond mere regulation of private conduct and becomes in effect a 'partner' or 'joint venturer' in the enterprise, the inference of state responsibility for the proscribed conduct could more easily be made." Holodnak v. Avco Corp., Avco-Lycoming Div., Stratford, 514 .2d 285, 288 (2d Cir. 1975) (suit under Sec. 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185).

Ibid. This is the point that the Rendell Baker court began. Rendell Baker stated:

> The more difficult problem, of course, is to decide what constitutes such an "intertwined relationship.

City. 1963 N.H. Laws Chapter 425, fourth "Whereas" clause, 1905 N.H. Laws Chapter 162, Sec. 1. While the exact nature of the title may be open to question, see, generally, United States v. Certain Land in City of Portsmouth, 247 F. Supp. 932, 934 (D.N.H. 1965); 23 Am Jur Dedication Sec. 56 (Lawyers Co-op 1965), for the purposes of this action the buildings belong to the city. Additionally, the City of Dover was charged with responsibility for the construction and maintenance of the physical plant. 1905 N.H. Laws Chapter 162, Sec. 1; 1963 N.H. Laws Chapter 425, Sec. 2. Clearly, the hospital is owned by the city.

The second factor the Rendell Baker court discussed was the appointment of the trustees by the town Board of Selectmen. The court indicated that this was the most significant factor in its finding of state

action in Downs v. Sawtelle, supra. "In such a situation, every decision made by the nominally private entity may fairly be attributed to the state, since the decision makers derive their authority from the state." 641 F.2d at 23. Here, the City of Dover not only has the power of appointment, it has the additional power of removal for cause. 1905 N.H. Laws Chapter 162; Dover v. Wentworth Douglas Hospital, supra.

The third factor discussed is the state's representation of the relationship between it and the entity in issue. The court discussed Powe v. Miles, 407 F.2d 73, 81 (2nd Cir. 1968) and Braden v. University of Pittsburg, 522 F.2d 948, 974 (3rd Cir. 1977):

> In each of those cases, the state legislature had passed a statute indicating the nature of the state's relationship to the university involved. In the Pittsburg

> case, the statute specifically declared that one university to be state-related, and it changed the school's name to indicate the state's role. In Powe v. Miles, New York statutes designated the state contract colleges as integral parts of the state university and referred to the private university which housed the contract college in question as "the representative of the state university trustees." Id. at 83. These cases indicate that where a state expresses its own understanding that an institution is under its control and subject to its constitutional obligations, these expressions may be given great weight.

In the instant case, there are numerous indicia that Wentworth Douglas was viewed by the state as a municipal hospital. 1963 N.H. Laws Chapter 425 provides, as pertinent herein, "Whereas said hospital, since 1949, has been known as the Wentworth Hospital, the Wentworth-Dover Hospital, and the Wentworth-Dover City Hospital;" (emphasis added). Section 1 of that act provides "the official and legal name of the Dover

municipal hospital shall be Wentworth Douglas Hospital". (emphasis added). Section 2 provides "The City of Dover is also authorized to construct and do and perform any and all acts necessary to establish and maintain the Wentworth-Douglas Hospital as a hospital for the city." (emphasis added). While the New Hampshire Supreme Court did not answer the question of title in Dover v. Wentworth-Douglas Hospital Trustees, supra, relying instead on statutory authority, its language is not inconsistent with the legislature's interpretaton of the city-hospital relationship discussed above. The court wrote:

> The plaintiff claims that the city owns the hospital and that the trustees are their agents obligated to carry out such directions as may be given them by the city council. The city relies upon Kardulas v. Dover, 99 N.H. 359, 111 A.2d 327 (1955), where it was held that the city was liable for negligence in the operation of the

> hospital. While the trustees were not parties to that action and the question decided was that the city's operation of the hospital was proprietary rather than governmental that decision lends credence to the proposition that the city has legal title to the hospital.

Judge Lampron, writing for the Kardulas court, was less unsure of the relationship. He indicated at 99 N.H. 359 and 362 that Dover was the operator of the hospital.

The final factor identified in Rendell Baker is an intention to evade the constitutional requirements, citing Evans v. Newton, 382 U.S. 296 (1966) and Gilmore v. City of Montgomery, supra. While those cases are more egregious factually than is this, the lesson to be applied here is that the form of the entity the state selects to act is immaterial where the state is acting. The state acts as surely by delegating power to a Board of Trustees, see 1905 N.H. Laws

Chapter 162, Sections 2 and 3, as it does by delegating the power to a municipality.

The defendants herein argue that all of the above is inconclusive in light of the requirement in Rendell Baker of a finding of actual contrl by the state over that portion of the hospital's operation that allegedly violates constitutional requirements, i.e., the credentialling process. This actual control argument was discussed in the context of the potential for state control existant in a situation where almost all of a private entity's funding is from the state. The court concluded that this no more makes a private school a state actor than do large defense contracts make a General Agency a branch of the Federal Government. 100% state funding and a potential for control is not enough to show state action, 100% and actual control

is required. But the overall decision rests upon a failure to demonstrate the existence of the four factors discussed above. The court wrote that the funding issue demonstrated a close relationship between state and school, but one short of the intertwined relationship necessary to final state action. The Rendell Baker court summarized:

> The school's funding, regulation, and function all show a relationship of close cooperation with the state. But these factors, together as well as separately, do not demonstrate that the state has so dominated the school as to make all the school's actions, and particularly those related to personnel, attributable to the state. The school's management by a private Board of Directors on which the state is not represented, and the broad range of independent discretion which these directors appear to exercise, particularly in personnel matters, belie the notion of state domination.

641 F.2d at 27. In contrast to the school in

Rendell Baker, all four of the factors characterized by the Rendell Baker court as "factors which have tended to weigh heavily in findings of such a relationship", are present in this case. They compel a finding of state action.

Prior decision of Watson, J. reaffirmed.

December 28, 1981

/s/ Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

Leo N. Hirsch, Esq.
Charles Philamore Bailey, Esq.
Charles A. Meade, Esq.
Joseph P. Nadeau, Esq.
Edward M. Kaplan, Esq.
A.J. McDonough, Esq.
Eugene M. Van Loan, III, Esq.

LIST OF DOCKET ENTRIES OF DEFENDANTS' OBJECTIONS TO PLAINTIFF'S MOTIONS FOR DISCOVERY

38. "Opposition of Defendant's Beckwith, Cusack, Neff, Temple and Myers to Plaintiff's Motion for Order Compelling Discovery. 2/1/78

72. "Defendants W-D Hospital, Beckwith & Cusak'c Objection to Motion for Order Compelling Discovery. 9/7/78.

73. Defendants Temple & Myers Objection to Motion for Order Compelling Discovery. 9/20/78

105. Objection of Temple to Plaintiff's Motion to Compell Discovery. 11/31/78

111. Objection of W-D Hospital to Plaintiff's Second Request for Production of Documents and Motion for Extension of Time Within Which to REspond. 12/21/78.

121. Defendant W-D Hospital's Objection to Plaintiff's third Request for Production of Documents. 2/12/79.

161. Defendant W-D Hospital's Objection to Plaintiff's Notice of Deposition. 4/30/78

162. Defendant William Cusack's Objection to Plaintiff's Notice of Deposition

163. Defendant Wentworth-Douglass Hospital's Objection to Plaintiff's notice of Deposition to W-D Hospital

171. Defendant's Objection to Plaintiff's Second Request for Production of Documents

184. Temple's Objection to Plaintiff's Request for Production

185. Myers' Objection to Plaintiff's Request for Production

197. Wentworth's Objection to Motion for Leave to Have Hospital Records Examined

204. Defendants Temple and Myer's Objection to Motion for Leave to Examine Hospital Records

205. Defendant Neff's Objection to Motion for Leave to Examine Hospital Records

206. Defendant Hospital's Supplementary Memo in Opposition to Motion for Leave to Examine Hospital Records

235. Defendants Hospital, Beckwith and Cusack's Objections to Plaintiff's Supplementary Interrogatories

239A. Defendant Neff's Objection to Motion to Strike Evidence or to Extend Discovery

241. Defendant Temple's and Myers' Objection to Pleintiff's Motion to Strike Evidence or to Extend Discovery

262. Defendant John Neff's Objection to Further Discovery Extensions

271. Wentworth-Douglass Hospital's Objection to Proposed Notice of Deposition

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

Bernard P. Colokathis,
Plaintiff,

v. #77-352-L

Wentworth Douglass Hospital,
et. al., Defendants

AFFIDAVIT OF BERNARD P. COLOKATHIS

NOW COMES Bernard P. Colokathis Plaintiff in the above captioned matter and says as follows:

On April 2, 1982 my Attorney, Leon Hirsch of 420 West 64th Street, New York, New York 10021 informed me that he had intended to withdraw as counsel from my case. I have his Motion to Withdraw dated April 2, 1982 and have read the subsequent Court Order of April 6, 1982 wherein my case was dismissed.

Attorney Hirsch's withdrawal was unanticipated and I did not discharge him

from my services. I do not agree with the statements contained in Attorney Hirsch's Motion to Withdraw relative to a fee dispute. It was my intention to attend the final pre-trial conference scheduled for my case on April 8, 1982. My local counsel of record, Charles A. Meade was also intending to be present. It was my intention on April 2, 1982 to proceed with this case as scheduled and to so inform the Court at the April 8, 1982 pre-trial conference.

/s/Bernard P. Colokathis
Bernard P. Colokathis

STATE OF NEW HAMPSHIRE
COUNTY OF

Personally appeared before me the above named Bernard P. Colokathis and made oath that the above statements provided by him are true and accurate to the best of his information, knowledge and belief.

/s/ Charles A. Meade
Justice of the Peace

DOCKET ENTRIES OF DEFENDANTS' MOTIONS FOR EXTENSIONS OR ENLARGEMENTS OF TIME

20. Dover Doctors' Park's Motion for Enlargement of time to File Motions or Answer. 11/16/77

21. Defendants' Motion for Extension of Time to File Answers to Interrogatories and to Respond to Request for Production of Documents. 12/20/77

23. Wentworth-Douglass Hospital, Beckwith, Cusack, Temple, Myers, and Neff's Motion for Extension of Time to File Answers to Interrogatories and respond to Plaintiff's First Requests for Production of Documents. 1/9/78

55. Motion of Dover Doctor's Park, Inc. For Extension of Time to File Answers to Pleintiff's First Set of Interrogatories and to Respond to Pleintiff's First Request For the Production of Documents. 4/26/78

84. Defendant Neff's Motion to Extend Time to Answer Interrogatories to December 15, 1978. 10/27/78

111. Objection of Wentworth-Douglass Hospital to Plaintiff's Second Request for Production of Documents and Motion for Extinsion of Time Within Which to Respond. 12/21/78

210. Defendants' Hospital, Beckwith and Cusack's Motion to Extend Time to March 10, 1980 to Respond to Pleadings. 2/15/80

214. Defendant Neff's Motion to Extend Time Within Which to Respond to Pleadings to March 10, 1980. 2/21/80

264. Motion to Continue 8/13/81 Pretrial by Defts Temple & Myers. 7/15/81

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1410

BERNARD P. COLOKATHIS
PLAINTIFF/APPELLANT

V.

WENTWORTH-DOUGLASS HOSPITAL, ET AL
DEFENDANTS/APPELLEES

Motion for Extension of Time
For Which to File
Petition for Rehearing

NOW COMES Bernard P. Colokathis and moves that the time in which to file a Petition for Rehearing, filed herewith, be extended to December 10, 1982.

Respectfully submitted,
Bernard P. Colokathis,
By his Attorneys,
STEPHEN R. FINE & ASSOC., PA

By/s/Charles A. Meade
Charles A. Meade
99 Middle Street
Manchester, N.H. 03101

December 7, 1982

I certify that a copy of the foregoing Motion was mailed this day to Robert M. Larsen, opposing counsel at Sulloway, Hollis & Soden, Concord, N.H.

/s/Charles A. Meade
Charles A. Meade

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1410

BERNARD P. COLOKATHIS
PLAINTIFF, APPELLANT

V.

WENTWORTH-DOUGLASS HOSPITAL, ET. AL.
DEFENDANTS, APPELLEES

PLAINTIFF'S PETITION FOR REHEARING

Bernard P. Colokathis
By his Attorneys
STEPHEN R. FINE & ASSOC., PA
99 Middle Street
Manchester, N.H. 03101
(603) 668-2343

By: Charles A. Meade

Page Missing from Filming Copy

468,470 (1st Circ. 1980); it is submitted that the court did not consider less drastic sanctions which would have counter balanced any concern over delay or harassment of the court and defendants.

The strong policy in favor of hearing cases on their merits must be weighed against prejudice to defendants which may result from plaintiff's attorney's conduct in prosecution of cases. This court pointed out that:

> ". . . (w)e have counseled in other cases that the court should consider less drastic sanctions than dismissal. Zavola Santiago v. Gonzalez Rivera, 553 F 2d 710,712 (1st Circ. 1977) (suggesting sanctions such as a warning, a formal reprimand, placing case at the bottom of the calender list, a fine, the imposition of costs or attorney fees, and the temporary suspension of the counsel from practice.) Here we see no less drastic sanction that would have served to prevent the further delay and harassment of the court and the defendants that the court's Order

> sought to avoid." (Slip Opinion at p.6)

In the present case the court also stated that: "We see no reason why the court and the defendants should have been put to the further trial preparation expense that would have been required had the court waited to dimiss the case when the plaintiff actually requested further delay." (Slip Opinion at p.6) It is submitted that the court is overly concerned with the possibility of delay and that the speculative assumption that delay was required is not supported by plaintiff's efforts to have the case reinstated and his promise that no delay would result. (See Appendix to Briefs, pp. 556-559) An order requiring plaintiff to post a bond in the amount of estimated costs and fees incurred by defendants from the time the case could have been reinstated to the scheduled trial date could easily have been done and would

have accomplished an objective of nullifying prejudice or expense to the defendants should plaintiff default on the trial date. It is submitted the the court failed to consider an appropriate lesser sanction so that a rehearing should be granted and the case remanded for trial. See Richman v. General Motors Corporation, 437 F. 2d 196 (1st Circ. 1971).

II.

Plaintiff Is Not Responsible For His Attorney's Conduct Which Precipitated Dismissal

The Court apparently also gave a great deal of weight to the fact that plaintiff has had seven attorneys appear for him. Numbers alone should not be a factor in determining whether a litigant should be denied a right to prosecute a case. Plaintiff in the present case is not responsible for other than one change of

attorneys - From Attorney Glasberg of Hirschkop and Grad to Attorney Hirsch. All other counsel appeared pursuant to an attorney's request or because Court rules (U. S. District Court Rule 5 (b)) requires appearance of local counsel.

The Court stated during oral argument that it is reluctant to punish an innocent plaintiff because of his attorney's conduct. It is submitted that the record indicates delay was the result of attorney's conduct during discovery and not due to plaintiff's personal lack of interest in the case. Attorney Hirsch appeared for the defendant in January of 1981 and no attempt for further discovery was made until September of 1981, eight months later. The District Court noted his concern over the conduct of the case particularly with regard to lack of discovery since its order of January 20, 1981. (See Appendix p. 475) The Court ordered

Notice of Depositions to be made by plaintiff by September 17, 1981, which was not done. (See Appendix pp. 478-486) The plaintiff in the present case cannot control his attorney's conduct in prosecution of his case and he should not be made to suffer the consequences.

Summary

The court apparently based its decision of November 15, 1982 on an assumption that plaintiff's local counsel was not able to proceed with a trial despite plaintiff's Rule 62 Motion and Affadavit requesting reinstatement for trial and that plaintiff was able to proceed. (See Appendix pp. 556-557). Plaintiffs local counsel had reviewed the extensive court file upon his appearance and was familiar with the pleadings and legal theory of the case having

assisted Attorney Hirsch with pleadings in opposition to defendants' renewed Motions to Dismiss and/or for Summary Judgment.

The Court could have required defendant to appear pro se or to file a bond for the cost of defense upon default. Plaintiff was always personally anxious to proceed to trial in the most expeditious manner and was personally frustrated by delay caused by both the defendants and his counsel.

The plaintiff has suffered from the courts denial of his opportunity to seek redress for the alleged wrongs done to him. In light of the policy in favor of hearing cases on their merits and in applying a sanction less drastic than dismissal, the court should rehear this appeal and apply a more appropriate sanction.

Respectfully submitted,
Bernard P. Colokathis,

By his Attorneys,
STEPHEN R. FINE & ASSOC., PA

By /s/ Charles A. Meade
Charles A. Meade

December 7, 1982

CERTIFICATE OF SERVICE

I, Charles A. Meade, hereby certify that two copies of the foregoing Petition for Rehearing were forwarded to Robert Larsen, Esq., of Sulloway, Hollis & Soden, Concord, N. H., Counsel for defendants on appeal.

Date: December 7, 1982

/s/Charles A. Meade
Charles A. Meade

AFFIDAVIT OF SERVICE

STATE OF NEW HAMPSHIRE
STRAFFORD, SS.

I, the undersigned Bernard P. Colokathis, of 130 Mount Vernon Street, Dover, County of Strafford and State of New Hampshire, depose and say that I am the Appellant herein, and that on ~~Monday~~, March 7, 1983, pursuant to Rule 28, Rules of the Supreme Court, I served THREE (3) copies of the within corrected "Petition for a Writ of Certiorari" on each of the parties required to be served herein:

On Wentworth Douglass Hospital, appellee, herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Eugene Van Loan III, of Wadleigh, Starr, Peters, Dunn and Kohls, counsel of record, at his office located on 95 Market Street, Manchester, New Hampshire.

On John L. Beckwith, appellee, herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Eugene Van Loan III, of Wadleigh, Starr, Peters, Dunn and Kohls, counsel of record, at his office located on 95 Market Street, Manchester, New Hampshire.

On William Cusack, appellee, herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Eugene Van Loan III, of Wadleigh, Starr, Peters, Dunn and Kohls, counsel of record, at his office located on 95 Market Street, Manchester, New

Hampshire.

On Roger C. Temple, appellee, herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Sulloway, Hollis, and Soden, counsel of record, at their offices located on 9 Capitol Street, Concord, New Hampshire.

On H. Jack Myers, appellee, herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Sulloway, Hollis, and Soden, counsel of record, at their offices located on 9 Capitol Street, Concord, New Hampshire.

On John Neff, appellee, herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to A. J. McDonough & Micheal O'Shaunessy, counsel of record, at their offices located on 99 Stark Street, Manchester, New Hampshire.

All parties required to be served have been served.

Bernard P. Colokathis
Petitioner

Subscribed and sworn to before me, this 8th day of March, 1983, by the said Bernard P. Colokathis.

Notary Public,
My commission expires
10/15/85